IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.969 OF 1999
IN
ARBITRATION PETITION NO.107 OF 1996
IN
AWARD NO.205 OF 1995

International Airports Authority of India
now known as Airports Authority of India ..Appellants.
V/s.
Hotel Leela Venture Limited ..Respondents.

Mr.F.Divetre, Sr.Counsel with Prakash Rajgopal i/b Ms.Rekha Rajgopal for the Appellants.

Mr.Francis Mathew, Sr.Counsel with Cyrus Adreshir and C.D.Patel i/b Kanga & Co. for the Respondents.

CORAM: D.K.DESHMUKH &
J.H. BHATIA, JJ.
RESERVED ON: 25TH JULY, 2007.
PRONOUNCED ON: 16th August, 2007

JUDGMENT: (Per J.H.Bhatia, J.)

1. The appeal is preferred by the original petitioner challenging the order in the judgment dismissing the Arbitration Petition filed under Sections 30 and 33 of the Indian Arbitration Act, 1940 to set aside the award dated 27th October, 1994 passed by the learned Sole Arbitrator.

2. Admitted facts are that the petitioner/appellant is International Airports Authority of India, now known as Airports Authority of India. The petitioner is the owner of 29,000 sq.mtr. of land

situated at Sahar, Bombay in the vicinity of international airport. The respondent was promoted by one Leela Scottish Lace Private Limited (hereinafter referred to as 'Promoter Company'), which held 3219.5 sq.mtrs. of land adjoining the land of the petitioner. The said Promoter Company requested the petitioner for grant of 9,000 sq.mtrs. of land on lease and remaining 20,000 sq.mtrs. of land on licence The land sought on lease was proposed to be used for construction of flight kitchen and hotel while the land proposed to be taken on licence was for beautifying it, for landscaping and for providing a beautiful garden, swimming pools, squash courts, golf course and other recreational facilities. The proposal made by the promoter company by the letter dated 20th May, 1982 was accepted by the petitioner by its letter dated 21st May, 1982. As agreed, about 5,000 sq.mtrs. land was to be used for flight kitchen and about 4,000 sq.mtrs. land was to be used for construction of the hotel. Accordingly, a lease deed dated 12-7-1982 was executed between the petitioner and the promoter company. The lease period was to be 30 years ending on 11-7-2012. The lease deed provided for payment of lease money of Rs.1,80,000/- per annum and in addition to the same, Clause 3A provided as under :

"3.A. In addition to the lease money

mentioned hereinabove as revised from time to time, the lessee shall pay a fixed sum based on his gross turnover as follows:

a) 2 percent of the gross turnover from the flight kitchen, plus

b) that part of 2% of the gross turnover of the Hotel which the IAAI land area bears to the total area of the Hotel."

The above proportion of the gross turnover shall be paid by the lessee quarterly. The said payment shall be made within 30 days of the close of each quarter.

3. Licence agreement dated 2nd August, 1982 was executed between the petitioner and promoter company in respect of remaining 20,000 sq.mtrs. of land for a period of 30 years. The licence was also to end on 11-7-2012 alongwith the lease. Licence fee was to be Rs.2,00,000/- per annum.

4. After the respondent company, i.e., the hotel Leela Venture was promoted by the promoter company, a fresh lease deed dated 19th October, 1983 came to be executed between the petitioner and the respondent for the same 9,000 sq.mtrs. of land, which was the subject matter of the earlier lease deed dated 12th July, 1982. This lease was for the remaining period and was to expire on 11th July, 2012. In terms of this lease, the only difference was that lease money was increased to Rs.2,25,000/- while other terms and conditions continued

to be the same.

5. Thereafter on 23rd November, 1983, another lease deed of additional 9,000 sq.mtrs. out of 20,000 sq.mtrs. land, which was given on licence, was executed between the petitioner and the respondent. The terms of this lease deed were similar to the terms of the lease deed dated 19th October, 1983. Thus, out of 29,000 sq.mtrs. land belonging to the petitioner, 18,000 sq.mtrs. land was leased out to the respondent while the remaining 11,000 sq.mtrs. land was in possession of the respondent on the basis of licence agreement executed between the petitioner and the promoter company.

6. Shortly after the execution of the lease deeds, by letters dated 9th December, 1983 and 31st March, 1984, the respondent sought clarification from the petitioner to the effect that under both the lease agreements, respondent would be liable to pay altogether 2% of the gross turnover from the flight kitchen and the share in 2% of the gross turnover of the hotel in proportion to the land of the petitioner with the total land of the hotel. However, the petitioner informed the respondent that it was liable to pay 2% of gross turnover separately under each lease agreement and thus,

the total amount to be paid by the respondent to the petitioner would be 4% of the gross turnover of the hotel as well as flight kitchen. A lot of correspondence took place between the parties from time to time. According to the petitioner, the respondent finally agreed that it is liable to pay 4% of the gross turnover of the hotel in view of the terms of two separate lease deeds. However, by letter dated 3rd April, 1989, the respondent contended that their offer to pay 4% of the gross turnover of the hotel in letter dated 11-11-1987 was in context of the negotiations that were in progress for conversion of the license to lease in respect of remaining 11,000 sq.mtrs. land. In view of the dispute, the matter was referred to the learned Sole Arbitrator.

7. On the request of the respondent, Chairman of the petitioner referred the following point for decision of the Sole Arbitrator by letter dated 5th November, 1992.

> *" The correct interpretation of Clause 3-A of the two Lease Agreements dated 19-10-1983 relating to the payment of a fixed sum based on the gross turnover of the Lessee as mentioned in their letter dated 10th April 1990 invoking the arbitration clause (enclosed)."*

Subsequently by another reference letter dated 2nd April, 1993, the chairman of the petitioner referred to the Arbitration, the following point also for determination and decision.

> *"To determine the amount payable in accordance with the true meaning of Clause 3-A of the two lease agreements and interest thereon and award payment of the said amount."*

8. Both the parties submitted their Written Statements, several documents and material before the learned Sole Arbitrator. It was contended by the petitioner that whole of 29,000 sq.mtrs. land including that under licence, should be treated as hotel land for the purpose of proportion of petitioner's share in the gross turnover of the hotel. After hearing the parties, the learned Sole Arbitrator held that the promoter company had already contributed 3219.50 sq.mtrs. of land on which some hotel was already in existence, and thus, upto June, 1989, the total area of the hotel including 18,000 sq.mtrs. lease land of the petitioner, was 21,219.50 sq.mtrs. The learned Arbitrator also held that the respondent had also taken 4305.50 sq.mtrs. of land on lease from the promoter company on 20th June, 1989 and out of the same 2,001 sq.mtrs. land was used for the purpose of hotel of the respondents and thus,

from June, 1989, the area of land with hotel 23,220.50 sq.mtrs. It was also held by the learned Arbitrator that the respondent had purchased 2102.28 sq.mtrs. land from Anmol properties on 29th December, 1989 and it was used for parking cars, etc. of the hotel and thus, with effect from 1st January, 1990, the total area of land with hotel was 25322.78 sq.mtrs. It does not include 11,000 sq.mtrs. of the land of the petitioner held by the respondent on the basis of licence agreement. The learned Arbitrator held that the petitioner was not entitled to 2% of gross turnover of the hotel independently under each of the two lease agreements but was entitled to share in 2% of the gross turnover of the hotel in the proportion which the I.A.A.I land (The petitioner's land) bears to the area of the hotel for three different periods depending upon the amalgamation of land of the respondent with 18,000 sq.mtrs. of land of the petitioner.

9. In view of the findings about the total area of the land of the hotel and the proportion of I.A.A. land, the petitioner was held entitled to 1.70%, 1.52% and 1.42% of the gross turnover respectively for each of the three different periods. The learned Arbitrator accordingly passed an award whereby the respondent was required to pay arrears of the royalty based on the

share of the petitioner in 2% gross turnover of the hotel with simple interest at the rate of 18% per annum as per lease agreement. The learned Arbitrator observed that the respondent had made some excess payment and the interest on such excess amount would also be at the rate of 18% per annum till the date of adjustment of such excess payment.

10. Being not satisfied with the award, the petitioner filed arbitration petition no.107 of 1996 which came to be dismissed by the learned Single Judge. By the impugned judgment, the learned Single Judge directed that there shall be decree in favour of the petitioner as per the award and the petitioner shall be entitled to recover the amount awarded with 18% per annum from the date of decree till payment. This is subject to the adjustment of the amount already paid by the respondent pursuant to the award.

11. Heard the learned counsel for both the Parties. The learned senior counsel for the petitioner vehemently attacked the award passed by the learned Arbitrator. He contended that 29,000 sq.mtr. land of the petitioner has been used for the construction of the hotel and for other purposes of the hotel. Out of the same, 18,000 sq.mtr. was used for the construction of the hotel and

remaining 11,000 sq.mtr. has been used for the purpose of development of garden, squash court, golf course, swimming pool, etc., which are necessary to increase the business of the hotel. According to him, 11,000 sq.mtr. land under licence could not be excluded from the petitioners contribution in the hotel land and, therefore, the petitioner would be entitled to get royalty on the basis of total 29,000 sq.mtr land. The learned senior counsel also contended that no land of the respondent was used for the purpose of construction of the hotel and, therefore, question of proportionate share of the petitioner in gross turnover would not arise. According to him, at the most contribution of the respondent in the land used for the purpose of construction of the hotel could be 3219.50 sq.mtrs. on which some part of the hotel was in existence when the land was taken on lease by the promoter company. He contends that the land allegedly taken by the respondent from the promoter company on lease or the land allegedly purchased from Anmol properties could not be amalgamated in the hotel land so as to reduce the share of the petitioner in the gross turnover, without the consent or approval of the petitioner. No such consent of the petitioner was taken. Further, it is contended that the land allegedly taken from the promoter company as well as land taken from the Anmol properties was never used

for the purpose of construction of the hotel. There was no reason to take land from Anmol properties just to have parking space for the cars because the land of the petitioner itself could be used for the purpose of car parking also. Therefore, that land could not be treated as contribution of the respondent.

12. The learned senior counsel for the petitioner vehemently contended that even though as per the terms of the lease deeds about 5,000 sq.mtr. land of the petitioner was to be used for the purpose of construction of flight kitchen and the petitioner would be entitled to 2% gross turnover of the flight kitchen under each of the two lease deeds, flight kitchen was never constructed and operated. That land was also used for the purpose of construction of the hotel and thus, the petitioner was deprived of 4% of the gross turnover expected from the flight kitchen. Further it is contended that as per the each lease agreement, the respondent was to pay 2% of the gross turnover of the hotel and, therefore, respondent was bound to pay 4% of the gross turnover of the hotel to the petitioner. Even though initially there was some dispute about the interpretation of the clause, the respondent had accepted the interpretation of the petitioner and had agreed to pay 4% of the gross turnover of the hotel to

the petitioner. The correspondence and the admission by the respondent in this respect has not been considered by the learned Arbitrator. It is also contended that the learned Arbitrator committed error in holding that the respondent had only agreed to pay 4% of the gross turnover subject to condition that the 11,000 sq.mtr. land under licence should be converted into lease land. It is contended that there was no such condition attached to the admission made by the respondent.

13. On the other hand, the learned senior counsel for the respondent strongly supported the award. It is contended that the learned Arbitrator had considered the terms of the contract and the relevant documents. The specific clauses of the lease deed were referred for his opinion. The learned Arbitrator was right in giving his opinion strictly as per the said terms of the contract. It is also contended that the learned Arbitrator has given valid reasons for inclusion of 7322.78 sq.mtrs. of land contributed by the respondents for the hotel in three instalments and, therefore, that land has been rightly included in the hotel land for the purpose of determining share of the petitioner. It is contended that the award can not be set aside merely because alternative view is possible.

14. Admittedly, shortly after execution of the lease deeds, a question arose as to how the share of the petitioner in the gross turnover of the hotel was to be calculated. There was lot of correspondence between the parties in this respect while the petitioner was insisting the respondent to pay 4% of the gross turnover from the hotel and the flight kitchen, the respondent insisted that the petitioner was entitled only to share in 2% of the gross turnover in proportion of its land with the total land of the hotel. Admittedly, the respondent did not construct, develop and operate flight kitchen and, therefore, petitioner could not get any share in gross turnover of the flight kitchen, which was expected as per the lease agreements. It will be noted that by the letter dated 11th June, 1987, the respondent had tried to contend that on the basis of proportion of the lease land of the petitioner and the land contributed by the respondent in view of the Clause 3A(b) of the agreements, the petitioner was entitled only to 1.70% of the gross turnover. This was rejected by the petitioner and it insisted for 4% gross turnover as royalty. After a lot of correspondence, the respondent forwarded twelve demand drafts for an amount of Rs.9,61,083/- to the petitioner towards royalty at the rate of 4% of gross turnover of the hotel under protest. By letter dated 6/12th October, 1987, the

petitioner acknowledged the receipt of the drafts but rejected the protest. By another letter dated 20/21st October, 1987, the petitioner not only insisted for 4% gross turnover for the lease land but also informed the respondent that the licence period for remaining 11,000 sq.mtrs. land has expired on 1st August, 1987 and the occupation over the same had become unauthorised. By the same letter, the petitioner also specifically informed that the request of the respondent for allotment of additional land for flight kitchen could not be acceded to.

15. After receipt of the letter dated 20th October, 1987, the respondent addressed the letter dated 11th November, 1987 informing the petitioner that the respondent was agreeable to the stipulation to pay 4% of the gross turnover of the hotel for 18,000 sq.mtrs. of land leased to the respondent. In the second paragraph of the same letter, the respondent also requested the petitioner to kindly consider the application for conversion of 11,000 sq.mtrs. of land from the licence to lease, which was required to build additional rooms and to make the hotel economically viable. This letter was followed by the letters dated 10th December, 1987 and 16th February, 1988. To appreciate the facts of the contract properly, it will be useful to quote from the

said letters. Relevant part of letter dated 11th November, 1987 reads as follows:

> *. "In view of the letter no.COM/912/3.3/87/4717 dated 20th October, 1987 from the Chief of Commercial Services, IAAI, we are now agreeable to the stipulation to pay 4% of the gross turnover of the hotel for the 18,000 metres of land leased out to us vide Lease Agreements dated 18th August, 1983 and 12th November, 1983 from the commencement of operations of the hotel."*

First three paragraphs of the letter dated 10th December, 1987 read as follows:

> *. Please refer to our letter dated 11th November, 1987 wherein we have agreed to the stipulation to pay 4% of the gross turnover of the Hotel (of 245 guest rooms) for the 18000 metres of land already leased out to us vide Lease Agreements dated 18th August, 1983 and 12th November, 1983.*
>
> *. We would now request you to kindly consider our application for conversion of 11000 sq.metres of land from licence to lease which is required to build the additional 192 guest rooms in the rear block of the hotel. The additional rooms would make the hotel economically viable.*
>
> *. We are willing to pay 4% of the gross turnover of the entire hotel (245 rooms + 192 rooms) to IAAI at the same terms and conditions as the previous agreements."*

From paragraph 1 of the above letter, it becomes clear that the respondent had agreed to stipulation to pay 4%

of the gross turnover of hotel, i.e., of 245 rooms constructed on 18,000 sq.mtrs. of land. Besides that in the next paragraph, the respondent requested for conversion of licence to lease in respect of remaining 11,000 sq.mtrs. and the paragraph 3 makes it clear that in consideration of the conversion of the licence to lease in respect of 192 rooms proposed to be constructed on said 11,000 sq.mtrs. also, the respondent was willing to give 4% of the gross turnover.

16. By the letter dated 16th February, 1988 while repeating request for conversion of licence to lease in respect of 11,000 sq.mtr. land, respondent offered 7.5% of incremental gross turnover of the hotel attributable to the extent of use of 11,000 sq.mtr. land. Following portion of the letter is relevant:

> *.....We would like to confirm that the F.S.I. (F.A.R.) actually utilised for construction will be the basis for the measurement of the area utilised for construction. The licensed Architect will produce the certificate to show the area utilised for construction so that as per our proposal, 7.5% of the incremental gross turnover of the hotel attributable to the extent of the use of the 11,000 sq.mtrs. of land can be paid to I.A.A.I. once the additional hotel block is put into operations.* **Till** *that time, we have already agreed to your stipulation to pay 4% of the gross turnover of the hotel already*

operational wide two lease agreements for 18,000 sq.mtrs. already executed with I.A.A.I."

(emphasis supplied)

From this letter there remains no doubt that the respondent had already agreed to the stipulation of the petitioner to pay 4% of the gross turnover of the hotel, which was already operational as per the terms of two lease agreements for 18,000 sq.mtrs. Besides this agreed position, the respondent offered 7.5% of the gross turnover attributable to the rooms, which would be constructed on 11,000 sq.mtrs. land proposed to be converted from licence to lease.

17. It is contended on behalf of the respondents that this was only offer to pay 4% of the gross turnover on condition of conversion of licence to lease in respect of the remaining land. The learned Arbitrator accepted this contention and held that as the petitioner had not accepted the proposal of conversion, the respondent is also not liable to pay 4% of the gross turnover. The learned Arbitrator observed that the matter was referred to him only for the purpose of interpretation of the Clause 3A(b) of the contract and on the basis of language of the said Clause, the petitioner could not claim 4% of the gross turnover. The learned Arbitrator observed that the Clause 3A(b) in

both the agreements being similar, the petitioner could claim only that part of the 2% of the gross turnover of the hotel which the I.A.A.I. (Petitioner's) land area bears to the total area of the hotel. In view of this language, the learned Arbitrator came to conclusion that with the increase in land proportion will also tilt in favour of the petitioner but the total gross turnover for sharing the profit on the basis of contribution of the land could not be more than 2% of the gross turnover.

18. It appears that the correspondence between the parties was placed before the learned Arbitrator. However, the learned Arbitrator only referred to the letter dated 11th November, 1987 and rejected the contention of the petitioner that the respondent had agreed to pay 4%. The learned Arbitrator observed as follows:

> *. "On a bare reading of the letter dated 11th November, 1987 it is clear that there is nothing in that letter which could be taken as admission as to the true meaning and content of Clause 3-A(b) of the lease. This letter has to be read in the context of negotiations between the parties for conversion of the licensed area of 11,000 square metres to leased area and it was a part of these negotiations that the Claimants expressed their willingness to pay 4% of the gross turnover of the Hotel* **provided the** *Respondents converted the remaining 11,000 square metres of land from licence to lease.*

Admittedly, these negotiations have failed as at present and nothing in this letter dated 11th November 1987 can, therefore, be considered as acceptance by the Claimants that they are liable to pay 4% of the gross receipts. In any case, the true meaning of Clause 3-A(b) is itself a matter which has been referred for decision in these proceedings."

(emphasis supplied)

19. We have already quoted the relevant three letters in this reference. It appears that the learned Arbitrator did not take into consideration the letters dated 10th December, 1987 and 16th February, 1988. Infact, even in the letter dated 11th November, 1987 there was nothing to show that acceptance of the respondent to pay 4% of the gross turnover was subject to condition of conversion of the licence land to lease land. It is difficult to understand on what basis the learned Arbitrator observed that willingness to pay 4% of the gross turnover of the hotel was expressed by the respondents provided the present petitioner converted the remaining 11,000 sq.mtrs. from licence to lease. The words **"We are now agreeable to the stipulation to pay 4% of the gross turnover of the hotel for 18,000 sq.mtr. of land leased to us vide lease agreement dated 18th August, 1983 and 12th November, 1983 from the commencement of operation of the hotel"** were not subject to acceptance of the proposal of conversion of the licence land to the lease land by the petitioner. That

proposal was in second paragraph. While in the letter dated 11th November, 1987 the respondents stated that **they were agreeable** to pay 4% of the gross turnover, in the first paragraph of the letter dated 10th December, 1987 the respondents stated "**We are agreed** to stipulation to pay 4% of the gross turnover of the hotel." In the letter dated 16th February, 1988, the respondent stated "**We have already agreed** to stipulation to pay 4% of the gross turnover of the hotel already operational vide two lease agreements for 18,000 sq.mtrs." If these three letters are read together, there remains no doubt that the respondent had agreed to pay 4% of the gross turnover of the hotel vide two lease agreements for 18,000 sq.mtrs. This acceptance has nothing to do with the proposal for conversion of the licence to lease in respect of remaining 11,000 sq.mtrs. land. It is material to note that while in the letter dated 11th November, 1987 there was no specific offer about sharing of the gross turnover in respect of 11,000 sq.mtrs. land proposed to be converted from licence to lease, in the letter dated 10th December, offer was 4% of the gross turnover in respect of 192 rooms to be constructed on the said 11,000 sq.mtrs. land. It appears that as the petitioner had not accepted the said proposal, by the letter dated 16th February, 1988, the respondent revised this offer from 4% to 7.5% of the

incremented gross turnover attributable to the extent of use of 11,000 sq.mtrs. land. If these letters are read together, there could be no doubt that the proposal of conversion of licence to lease in respect of 11,000 sq.mtrs. land was not a condition for acceptance of payment of 4% gross turnover of the hotel in respect of first two lease deeds.

20. We have already pointed out that as per the terms of the Clause 3A(b) in both the lease agreements, there was stipulation that the lessee (respondent) shall pay 2% of the gross turnover from the flight kitchen. This Clause has nothing to do with the total area of the land therefore, as per that Clause for the first lease of 9,000 sq.mtrs., petitioner is entitled to 2% of the gross turnover from the flight kitchen and it was also entitled to further 2% of the gross turnover from the flight kitchen in consideration of the second lease deed. It means for the total 18,000 sq.mtrs. land given under the lease, the petitioner was entitled to 4% of the gross turnover from the flight kitchen. It was clearly proposed and agreed that 5,000 sq.mtrs. land would be used for the flight kitchen and remaining land would be used for the purpose of construction of hotel. The respondent did not construct, develop and operate flight kitchen and whole of the land was used for the

construction of the hotel. Thus, the petitioner was deprived of 4% of the gross turnover from the flight kitchen. In view of this, the return to the petitioner was to substantially reduce and the respondent was aware about it. Possibility can not be ruled out that the respondent agreed to pay 4% of the gross turnover of the hotel in view of this reason also. Anyway, it appears that the dispute about interpretation of Clause 3A(b) had come to an end with the three letters dated 11th November, 1987, 10th December, 1987 and 16th February, 1988 addressed by the respondent to the petitioner whereby it agreed to pay 4% of the gross turnover to the petitioner. After that there could be no dispute about the said Clause. It appears that though this acceptance was unconditional, later on the respondent tried to take a stand that it was subject to acceptance of the proposal for conversion of licence to lease in respect of remaining land. This was an afterthought stand taken in the letter of 3rd April, 1989, by which the respondent requested the petitioner to refer the dispute to the Arbitrator. In view of the facts, circumstances and the unconditional and unambiguous admission made by the respondent in the aforesaid three letters, there remains no doubt that the respondent had agreed to pay fee to the petitioner on the basis of 4% of the gross turnover of the hotel.

21. The learned counsel for the respondent contended that when the matter was referred to Arbitrator, the award can not be set aside merely on the ground of misreading, misconstruction and misappreciation of some material on record nor it could be set aside merely because on Court's own assessment an alternative view is possible. In support of this the petitioner relied upon the **State of Rajasthan v. Puri Construction Company Limited And Another (1994) 6 Supreme Court Cases 485,** Their Lordships observed as follows in paragraph 26 of the judgment:

> *"26. The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. In Sudarshan Trading Co. v. Govt. of Kerala it has been held by this Court that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. (emphasis supplied) Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the Court cannot take upon itself the burden of saying that this was contrary to the contract and as such beyond*

> *jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the Court. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator."*

There could be no dispute about the legal proposition laid down in the above observations of the Supreme Court, particularly when all the material oral as well as documentary has been considered by the Arbitrator and he comes to a conclusion that one of the parties is entitled to certain lumpsum amount. However, if material evidence and documents are not taken into consideration by the Arbitrator, the award can not be supported. In fact, in **K.P.Poulose v. State of Kerala and another AIR 1975 Supreme Court 1259,** Their Lordships held that when the material was ignored by the Arbitrator, it can amount to misconduct of the Arbitrator under Section 30(a) of the Arbitration Act, 1940 and the award can be set aside if the Arbitrator has misconducted himself or the proceeding. In **K.P.Poulose** (Supra), Their Lordships observed as follows in paragraph 6:

6. Under Section 30 (a) of the Arbitration Act an award can be set aside when an Arbitrator has misconducted himself or the proceedings. Misconduct under Section 30(a) has not a connotation of moral lapse. It comprises legal misconduct which is complete if the Arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision. It is in this sense that the Arbitrator has misconducted the proceedings in this case. We have, therefore, no hesitation in setting aside such an award. In the result the judgment of the High Court is set aside and that of the Subordinate Judge is restored. The award of the Arbitrator thus stands quashed. The Arbitrator will complete the proceedings after considering all the relevant documents including Ext. P. 11 and Ext. P. 16 after giving opportunity to the parties. The appeal is allowed with costs."

22. In the **State of Rajasthan v. Puri Construction (Supra),** Their Lordships observed as follows in paragraph 31:

".....Over the decades, judicial decisions have indicated the parameters of such challenge consistent with the provisions of the Arbitration Act. By and large the courts have disfavoured interference with arbitration award on account of error of law and fact on the score of misappreciation and misreading of the materials on record and have shown definite inclination to preserve the award as far as possible. As reference to arbitration of disputes in commercial and other transactions involving substantial amount has increased in recent times, the courts were impelled to have fresh look on the ambit of challenge to an award by the arbitrator so that the award does not get undesirable immunity. In recent times, error in law and fact in basing an award has not been given the wide immunity as enjoyed earlier, by expanding the import and

> *implication of "legal misconduct" of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced to mockery of a fair decision of the lis between the parties to arbitration. Precisely for the aforesaid reasons, the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid."*

With highest respect, we must record that there is no allegation of any personnel misconduct on the part of the learned Arbitrator. However, when material documents are not taken into consideration, this may amount to misconduct of proceeding, resulting in miscarriage of the justice and, therefore, it will be legal misconduct, which is sufficient to set aside the award. In view of the above observations in the **State of Rajasthan v. Puri Construction** as well as **in K.P.Poulose v. State of Kerala and another,** we find no difficulty in holding that when the learned Arbitrator had not taken into consideration the important letters from the respondent, it resulted into miscarriage of justice and amounts to legal misconduct on the basis of which award may be set aside under Section 30(a) of the Arbitration Act, 1940.

23. The learned counsel for the respondents relied

upon **M/s. Raval and Company v. K.G.Ramchandran and Others (1974) 1 Supreme Court Cases 424** and contended that when the terms of the contract have been reduced to writing and registered, variations in the terms of lease also be made only by the registered deed and any other communication purported to be variations is liable to be excluded by virtue of Section 92 of the Evidence Act. In that case, the lease agreement was registered and the rent was also fixed below Rs.400/- on the basis of total payment made by the tenant. The learned Single Judge had come to conclusion that the rent was more than Rs.400/- per month and, therefore, lease was exempted from the Rent Act. The Supreme Court found that if the correspondence is not taken into consideration, as per the terms of the contract duly registered, the rent was less than Rs.400/- and the property was not exempted from the application of the relevant rent act applicable in the State of Tamilnadu. In the present case, as the facts will reveal, even the respondents had not acted strictly as per the terms of the lease agreement. As per the initial offer and acceptance as well as the terms of the agreement, 5,000 sq.mtrs. of land was to be used for flight kitchen and the petitioner was to get 2% of the gross turnover of the flight kitchen under each of the two lease deeds. However, the respondent did not act upon that term and used whole of the land

for the construction of the hotel and not for the flight kitchen. In view of this conduct of the respondent, the return to the petitioner was to be substantially reduced. In such circumstances, there was dispute about the interpretation of the contract and after long correspondence, the respondent agreed to pay 4% of the gross turnover of the hotel. Therefore, merely because there was no fresh lease deed changing terms of the contract, the letters issued by the respondents admitting its liability to pay 4% of the gross turnover can not be ignored.

24. Having come to conclusion that the respondent was liable to pay 4% of the gross turnover, question is whether whole of the 4% has to be paid to the petitioner or it will be as per the proportion of the land of the petitioner with the total land of the hotel. The Clause 3A(b) reads as follows:

> *"3.A. In addition to the lease money mentioned hereinabove as revised from time to time, the lessee shall pay a fixed sum based on his gross turnover as follows:*
>
> *a) .....*
>
> *b) that part of 2% of the gross turnover of the Hotel which the IAAI land area bears to the total area of the Hotel."*

As per Clause 3A(b), the lessee shall pay fixed sum based on that part of 2% of the gross turnover of the hotel, which I.A.A.I. land area bears the total of the hotel. Now in view of the above findings and the admissions of the respondent, 2% will have to be read as 4%. Taking into consideration both the lease agreements and the letters dated 11.11.1987, 10-12-1987 and 16-2-1988 from the respondent, it must be held that the petitioner would be entitled to that part of 4% of the gross turnover of the hotel which I.A.A.I. land bears to the total of the hotel. Infact the initial agreement clearly shows that in the proportion of the land, this gross turnover was to be shared between the petitioner and the respondent. If the hotel is constructed and rent is only on 18,000 sq.mtrs. land of the petitioner, it would be entitled to receive the complete 4% of the gross turnover of the hotel but if there is some contribution from the respondent also in the said land, the share of the petitioner would be proportionate in the proportion in which the land of the petitioner is to the land of the respondent admittedly.

25. Therefore, it will be necessary to find out how much land is contributed by the parties. First dispute is about 11,000 sq.mtrs. licenced land. It was contended on behalf of the petitioner that the licence

land was used for the purpose of development of garden, squash Court, Golf Court, Swimming pool and other recreational facilities, which are available only to the customers and visitors of the hotel and not for general public. Naturally such facilities add to the grandeur and attraction of the hotel and also to the business of the respondent. Being the Five Star Hotel, such facilities are not only important but necessary for the business of the hotel. It may be noted when the first lease deed was executed, total 20,000 sq.mtrs. land was given under licence but out of this, 9,000 sq.mtrs. land was leased out under the second lease deed. Therefore, after the second lease deed, licence land is only 11,000 sq.mtrs. One has to note the difference in the terms of the contract pertaining to the lease and the licence to find out whether the licence land can be counted as the contribution of the petitioner in the total land of the hotel. The lease was for a period of 30 years and besides the fixed lease money of Rs.2,25,000/- under each lease of 9,000 sq.mtrs., the petitioner was to get 2% of the gross turnover of the flight kitchen and a part of 2% of the gross turnover of the hotel in proportion to its land with the total area and the land of the hotel. However, there were no such terms about share in gross turnover as far as the licence land is concerned. It is material to note that

as per the offer made by the petitioner as per letter dated 21st May, 1982, for the lease land, ground rent was to be Rs.20/- per sq.mtr., which was subject to revision after three years. However, as far as licence land was concerned, the licence fee was to be at the rate of Rs.10/- per sq.mtr. While lease period was to be thirty years, period of licence was to be 5 years only. The land under lease was available for construction of hotel but on the licence land, no such construction could be made. The licence fee for 20,000 sq.mtrs. land was fixed in the licence agreement at Rs.2 lakhs at the rate of Rs.10/- per sq.mtr. The difference in terms of the contract pertaining to the lease and licence clearly indicates that the licence land was not to be counted for the purpose of payment to the petitioner out of the gross turnover of the hotel while it was to be paid on the basis of area of the land under the lease. The learned Arbitrator rightly rejected the claim of the petitioner in this respect. In view of the contract, it must be held that contribution of the petitioner is 18,000 sq.mtrs. land given under the two lease deeds.

26. There is a dispute about the contribution of the respondent in the total land of the hotel for the purpose of distribution of 4% gross turnover of the

hotel. The learned Arbitrator held that the respondent had contributed 3219.50 sq.mtrs. land initially and this finding is corroborated by documentary evidence including letters dated 20th May, 1982 from the promoter company to the petitioner and the reply of the petitioner dated 21st May, 1982. In the first paragraph of the letter dated 2nd May, 1982 itself, it was mentioned that 4,000 sq.mtrs. land to be taken on lease can be used for the construction of part of the hotel, the other part being on the land belonging to the respondent. Even though on behalf of the petitioner, it was contended that it is entitled to complete 4% of the gross turnover of the hotel because complete hotel is constructed on 18,000 sq.mtrs. land only, in view of the documentary evidence and particularly admission of the respondent in the letter dated 12th December, 1982, there can be no dispute that the respondent had contributed land of 3219.50 sq.mtrs. for construction of the hotel.

27. However, there is serious dispute about further contribution by the respondent. It is the case of the respondent that it had taken 4305.50 sq.mtrs. land on lease from the promoter company and it was used for the purpose of F.S.I., cooling towers, which is a part of the air condition establishments, laundry, etc.

However, the learned Arbitrator rightly found that out of this 4305.5 sq.mtrs. land, 2304.50 sq.mtrs. was used for the bungalow of the Chairman and the Managing Director and that land could not be treated as the land with the hotel. The learned Arbitrator found that 2001 sq.mtrs. land out of the same was actually used for the hotel. However, record reveals that on the said land there was a building consisting of ground plus 3 floors and only ground floor was used as laundry and for other purposes of the hotel. Record reveals and the learned Single Judge noted that remaining three floors were used for the purpose of a factory, which had not concern with the hotel. It is true that the laundry is essential for the hotel but if only ground floor of that premises are used for the hotel and three upper floors are used for the factory unconnected with the hotel, the respondent could be entitled to count only 1-4th of that land as the land under use of the hotel. By no stretch of imagination whole of 2001 sq.mtrs. land can be counted as the part of the hotel. Therefore, we find that out of the said 2001 sq.mtrs. land, only 500.25 sq.mtrs. land could be treated as contribution of the respondent towards the hotel. This much land was taken and was used for the hotel from 1st July, 1989.

28. According to the respondent, it had taken

further 2102.82 sq.mtrs. land from the Anmol properties on 29th December, 1989 and it was used for parking cars and has been treated as area of the hotel. The learned Arbitrator treated this as contribution with effect from 1st January, 1990. Serious objection was taken to this on the ground that sufficient land of the petitioner was available for the purpose of car parking and, therefore, there was no need to purchase this land and to treat the same as land under the hotel. It is also contended that 11,000 sq.mtrs. land of the petitioner under licence is being used for the purpose of garden, squash court, golf course, swimming pools and other recreational facilities, which are also very essential for five star hotel but that land is not being counted as contribution of the petitioner. It is further contended that this addition of the land was to reduce the share of the petitioner out of the gross turnover of the hotel and, therefore, this could be taken only with consent or approval of the petitioner, who is major contributor of the land on which hotel is constructed. It is contended that the respondent had not taken any such consent. We find substance in this contention. There is no record to show that this land was taken by the respondent with consent of the petitioner. It is true that parking space is necessary for five star hotel but it can not be said that other facilities like Golf Course, Squash

Court, Swimming Pool and other recreational facilities are unnecessary. They are also equally contributing to the attraction of the hotel and its business. Even though the matter was referred to the Arbitrator for the first time in the year 1992, the respondent had made a request to refer the dispute to the Arbitrator on 3rd April, 1989. After that request, the respondent was not expected to make any substantial changes without consent of the respondent. In our considered opinion, this addition could not be taken into consideration particularly when it was made without consent of the petitioner and that too after the respondent had made request to the petitioner to refer the dispute to the Arbitrator. This logic and reason could also be applied to the contribution of the land taken for the purpose of laundry but in our considered opinion the laundry is to be treated as part of the building of the hotel without which five star hotel can not be run. Therefore, while that contribution will have to be counted, the above 2102.28 sq.mtrs. land purchased from Anmol properties on 29th December, 1989 for car parking can not be counted to reduce the proportion of the petitioner in the gross turnover of the hotel.

29. In view of the above observations, we find that the total area of the hotel was as follows:

(a). Upto 30th June, 1989, 21,219.50 sq.mtrs.

(b). From 1st July, 1989, 21,719.75 sq.mtrs.

30. In view of the total land of the hotel and the I.A.A.I. (Petitioner’s) land being 18,000 sq.mtrs., the proportion of the petitioner’s land will be as follows:

a). Upto 30th June, 1989, 18,000/21,219.50 equal to 85%.

b). From 1st July, 1989 onwards, 18,000/21,719.75 sq.mtrs. equal to 82.87%.

. Therefore, in terms of the Clause 3A(b) of the lease agreements read with the agreement by the respondent by their letters, the petitioner will be entitled to get share out of the 4% gross turnover of total as follows:

(a). Upto 30th June, 1989, 85% of 4% of the gross turnover equivalent to 3.4% of the total turnover.

(b). From 1st July, 1989 onwards, 82.87% of 4% of the gross turnover equal to 3.31% of the total turnover.

31. After careful perusal of record, We find that the learned Arbitrator did not consider the vital documentary evidence and facts before passing the award. In our opinion it has resulted in miscarriage of justice and if we do not interfere it would result in perpetuation of injustice. The learned Single Judge also did not consider the relevant documents before dismissing the petition challenging the award. Therefore, we find it necessary to set aside the impugned judgment and the award.

32. In the result, the appeal is allowed. The award passed by the learned Arbitrator as well as the impugned judgment and order passed by the learned Single Judge in Arbitration Petition No.107 of 1996 are hereby set aside.

. The respondent, Leela Venture Limited shall pay to the petitioner I.A.A.I.

(a) 85% of the 4% equivalent to 3.4% of the gross turnover of the hotel upto 30th June, 1989 and

(b) 82.87% of 4% equivalent to 3.31 of the total turnover of the hotel with effect from 1st July, 1989 as

the royalty to the petitioner towards the 18,000 sq.mtrs. land given by the petitioner to the respondent under the two lease deeds.

. The amount already paid by the respondent shall be adjusted against the amount which may be due to the petitioner as per this direction. Arrears, if any, shall be paid with 18% p.a. simple interest as per the agreement between the parties.

. In view of the nature of dispute, party shall bear their own costs.

(D.K.Deshmukh, J.)

(J.H.Bhatia, J.)